RECENT LEGAL LITERATURE

AMERICAN RAILROAD RATES. By Walter Chadwick Noyes, a Judge of the Court of Common Pleas in Connecticut; President of New London Northern Railroad Company; Author of "The Law of Intercorporate Relations." Boston: Little, Brown & Company, 1905, pp. 277.

Considering the present widespread interest in railway rates and railway regulation, this book appears at an opportune time. Occupying the position of judge of the Court of Common Pleas in Connecticut, as well as that of president of the New London Northern Railroad Company, its author is fitted through his experience to approach the subject from the standpoint of a publicist as well as from that of a railway manager. While it is easy to see that the author's views are colored by his railway interests, the book is a fair and temperate discussion of the subject and one well worthy of consideration by shipper and consumer as well as by railway advocate.

Judge Noyes limits his discussion of rates to freight rates, observing in his preface that "the fundamental principles governing rates and fares are the same." He distributes his discussion under ten chapters: I, Underlying Principles; II, Limitation of Rates; III, Making Rates; IV, Classification and Tariffs; V, Discrimination; VI, Competition and Combination; VII, Movement of Rates; VIII, Comparison of Rates; IX, State Regulation of Rates; X, Federal Regulation of Rates.

In the first chapter are considered briefly the legal and the economic principles to which railway operations are subject. Judge Noyes, like most writers upon the subject, especially those who approach the subject from the lawyer's standpoint, is unable to steer clear of the timeworn statement that a modern railway is a public highway, whereas the fact is that the modern railway is a purely private way used by a common carrier. It may be asserted beyond possibility of successful contradiction that even tho a railway corporation should acquire title to all its lands by purchase of the fee and should hold these lands subject only to the burden of the public's right to travel on the common highways crossing them, the railway problem would not be a whit different from what it is today. The railway would present precisely the same monopolistic features as at present. Left free to barter in the market, and subject only to purely economic control, its rates and charges would be governed by precisely the same principle as now controls them—that the charge must be adjusted to what the traffic will bear,—and there would be then, as now, the same inequitable adjustment of the burden between the shippers and consumers at non-competitive points and those at competitive points. There would be then as now the same necessity for the intervention of the state to secure to its members an equitable distribution of the benefits arising from the economies of railway transportation. The railway problem arises from the double fact that a railway is, as to a large proportion of its users, a monopoly, and that being an enterprise involving a large fixed capital it is correspondingly liable to be abused where subjected to competition. The fact that the earliest legislators who sought to regulate railways looked on them as analogous to turnpike roads, and tried to analyze their charges into

two components, the one of which should be a toll determined upon consideration of the value of the commodity transported, and the other of which should be determined upon consideration of the cost of carriage, is neither of any particular significance nor of any particular service in determining upon what principle railway operations shall be regulated by the state. Aside, however, from the devotion of a disproportionate amount of space to a consideration of the alleged analogy, the first chapter states fairly and clearly the two principal features of railway operation—a heavy fixed charge entirely independent of operation and of the operating expense a large proportion practically independent of the extent of operation. Especially commendable is it in the author, when it is remembered that he is a railway president, to recognize and to state that "A railroad is an economic monopoly in many "places. Most localities have only a single line and are without water com-"munication. Here there is no such thing as competition. The possibility "of building a parallel line is of little benefit to the shipper. If not a capital-"ist he cannot build; and if he is, the building proposition is likely to be "unattractive. Traffic sufficient to enable one railroad to pay large dividends "may not be enough for two to make any dividends. Moreover, a new road "can compete with difficulty with an established line. * * * The more "business a railroad does the cheaper it can do it. The old road, with two "or four tracks and large tonnage, can make lower rates than the single "track road with small tonnage. * * * *

"A railroad is a practical monopoly, from the point of view of the small "shipper, even in those places where there are competing roads. He is not "in a position to bargain. He cannot deal on even terms. He must pay the "rate charged by one of the railroads or not ship his goods.

"Now, while monopoly is the opposite of competition, and while with-"out competition the laws of trade cannot operate, it does not follow that a "railroad monopoly is injurious to the public. Industrial competition tends to "low and equal prices. Railroad competition * * * * generally tends to "discrimination and unequal rates. Railroad monopoly—its opposite—ought "to lead to low as well as equal rates, and this because the railroad is subject "to the law of increasing returns. If one railroad between two cities be able "to attend to all present traffic, and have room for more, how is the public "benefited by the construction of another road? One road with the increas-"ing profits attending an increased business, should either give the public "better facilities or lower charges. If it will not do so voluntarily it should "be compelled to do so by public authority. Two roads dividing the traffic "may be obliged to keep up charges and economize in facilities in order to "make anything at all. The railroad should be recognized as a monopoly and "treated as such.

"A monopoly under governmental supervision may better promote the "public interest than the freest competition. But it must be closely watched. "How closely, is the important question. Governmental regulation cannot "become governmental control without a shifting of responsibilities."

The chapters of most interest to readers of the MICHIGAN LAW REVIEW will probably be found to be—V, Discrimination; VI, Competition and Com bination; and X, Federal Regulation of Rates.

In the discussion of Discrimination, the author classifies it with regard to discrimination between commodities, between localities and between persons. Concerning the first, he concludes with the statement, "The value of "the service is the controlling factor; * * * * classification upon the "basis of value, modified by the elements of cost and risk, is reasonable and "proper, and does not constitute unjust discrimination, or discrimination at all "unless it affect similar articles." Concerning local and personal discriminations he says:

"(1) A discrimination in charges is unjust when the same service is "rendered to different localities and the circumstances and conditions do not "warrant it.

"(2) A discrimination in charges is just when the same service is rendered to different localities and the circumstances and conditions [do] "warrant it.

"(3) A discrimination in charges is unjust when the same service is "rendered to different persons."

The author might well have extended his statement so as to say that an unjust discrimination exists where the difference in the charges is disproportionate to the difference in the services. There may, for example, be an unjust discrimination between shippers in respect of carload rates and less-than-carload rates. After laying down his general principles upon the subject of discrimination, the author proceeds to a very satisfactory discussion of the various devices through which unjust discriminations have been effected and of the different circumstances and conditions which, according to the courts, warrant discriminations and deviations from the long and short haul principle.

In the chapter on "Competition and Combination" is presented an interesting discussion of direct competition and of indirect competition. The author shows very clearly the inequitable distribution of the benefits of railway transportation which is brought about through the operation of direct competition, and in comparison with this the beneficial effect of indirect competition, by which the author means that between carriers supplying the same market from different sources. In this latter case, the carrier and the shipper, instead of being antagonistic elements in the distribution of a substantially fixed sum, are component parts of an economic unit competing with other like economic units in supplying a common market. Under such competition, while the carrier and the shipper together get a somewhat less return than they would if they monopolized the market, the carrier is bound to allow to the shipper something in excess of his bare cost of production, enough more to make the shipper an economically efficient producer. In the discussion of combination the subject of railway pooling is somewhat fully considered. The author shows clearly how the opposition of the public to railway pooling has succeeded only in replacing it with a much more inimical form of combination, viz., actual consolidation.

The last chapter, "Federal Regulation of Rates," is the one of greatest present practical interest. In it the author asserts: "The power of the "federal government to regulate rates is subject to no limitations other than

"those contained in the Constitution. The limitations which are applicable "are three:

"(1) The division of the functions of government into three depart- "ments—legislative, judicial and executive.

"(2) The Fifth Amendment.

"(3) The provision against port preferences." Under (1) he reaches these conclusions: "(a) Making rates for the future is purely a legis- "lative function; (b) Congress may exercise this power to make future rates "either directly or through a commission; (c) Rates made by a commission "have the same effect as if made by Congress directly; (d) Determining in "a controversy the reasonableness of an existing rate is a judicial function; "(e) Judicial and legislative functions cannot be combined; (f) And—drawn "from the federal Constitution by itself—judicial functions can only be exer- "cised by judges holding their offices during good behavior and receiving a "compensation which cannot be diminished during their continuance in office." Under (2), he says "(a) Rates made by Congress directly or through a com- "mission have the force of law. Making a rate in effect is making a law that "such shall be the rate. (b) The courts can alone determine whether law- "made rates conflict with the Fifth Amendment. (c) Law-made rates only "conflict with the Fifth Amendment when they deprive the railroad of its "property without just compensation or due process of law, i. e., when they "are confiscatory. (d) Schedules of rates may be confiscatory. Theoreti- "cally, individual rates may be confiscatory; practically, they cannot be. (e) A "rate may be unreasonable, and therefore an unlawful charge, when made by "a railroad. The same charge as a law-made rate may not be so unreason- "able as to be confiscatory. (f) Courts can only pass upon the constitution- "ality of law-made rates. They cannot exercise supervisory power over such "rates and thereby participate in the exercise of the legislative power of "making rates." Under (3), he concludes that the port-preference provision, while it might invalidate specific acts of a commission would not invalidate an Act of Congress conferring the rate-making power upon a commission. The question in this case would always be whether or not a particular regulation made by the commission does in fact constitute a preference of the ports of one state over those of another.

With Judge Noyes doubtless few will take issue upon the foregoing propositions. Some of his deductions from them cannot, however, be so readily admitted. When he comes to the practical application of them in devising effectual remedies for unjust and unreasonable rates and charges, he maintains that only a branch of the federal judiciary can pass in the first instance upon the reasonableness or the unreasonableness of a rate complained of, and such rate having been found by a court to be unreasonable, the rates which shall thereafter be held to be reasonable shall be determined by some legislative agency. It is to be apprehended, however, that Judge Noyes does not here sufficiently distinguish between the determination of the reasonableness or unreasonableness of rates for the purpose of adjudicating the rights of litigants flowing from such rates in the past, and the determination of such question of unreasonableness or unreasonableness for the purpose of declaring what the future rate shall be. Manifestly to promulgate a different rate for

the future is in itself a declaration that the past rate has become unreasonable. Such declaration thus involves a finding of fact. The mere finding of a fact cannot be considered an exclusively judicial act. Every branch of the government, whether legislative, executive, or judicial, must in essence find the existence of certain facts before it can act. It is for the purpose of ascertaining facts that we have frequent and extensive inquiries conducted by legislative committees. The law prescribes that under certain circumstances the executive branch shall act thus and so. How can it act or refuse to act, without first passing upon the existence or non-existence of the requisite facts? The finding a rate to be reasonable or unreasonable is not a judicial function. Such finding becomes a judicial function only as it is incidental to the determination of the rights of one or both of parties litigant. The truth of the matter would seem to be that the legislative act is complete when the Legislature declares that railway rates shall, for example, "be reasonable and just," and that a designated official body shall from time to time upon certain facts being presented to it according to prescribed form ascertain and declare in precise numerical form what rates are under the circumstances then existing legal because "reasonable and just." Such ascertainment and declaration is not legislative but executive, and is on a precise parallel with the determination by a customs officer of the amount of duty to be paid upon the importation of a specific parcel of merchandise. Where the law leaves matters to the discretion of the executive, whether rate-making commission or customs officer, the court will not attempt to control such discretion further than to require that it be exercised honestly and in the form prescribed by law. But a commission empowered to adjudicate the rights of parties litigant under a statute requiring rates to "be reasonable and just" would undoubtedly be open to the objection that it is a hybrid if the statute attempted to empower it to promulgate rates for the future, and as such hybrid compound of judicial and executive functions it would be unconstitutional.

Of possibly even greater force than these technical considerations is the fact that a court is by its very nature incapable of considering the facts that really determine the reasonableness or unreasonableness of a specific rate. As was well pointed out by Mr. Victor Morawetz, general counsel for the Atchison, Topeka and Santa Fe Railway Co., in his testimony given in May last before the Senate Committee on Interstate Commerce, there is a considerable range between a rate so low as to be confiscatory and one so high as to be extortionate. Those who advocate the determination of the reasonableness or unreasonableness of a rate by a court in the first instance have not so far, I believe, pointed out any cases where the court, acting under the common law, has determined a rate to be unreasonably high. It is true that in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, Judge Speer intimates (118 Fed. Rep. 623) that a rate is unreasonably high when it is so high as to be prohibitory of the traffic between certain points while the same carrier makes rates between other points substantially similarly circumstanced sufficiently low to move the goods, but this decision was made after the matter had been passed upon by the Interstate Commerce Commission, so that under the statute its findings were made *prima facie* true and correct.

Where a rate shall be placed in the frequently broad interval between the unreasonably low, or confiscatory, and the unreasonably high, or exorbitant, is to be determined by considerations which courts are not by their nature well adapted to weigh. The matter is a question of general expediency in which the interests of the producer, the carrier and the consumer ought all to be considered and duly weighed. The consumer cannot well be a party before the court. Where the final determination of the rate is left to the carrier, the sole consideration acting upon the carrier, save in so far as it assumes the role of benevolent despot, or save in so far as the officer of the carrier neglects the carrier's interests—the sole consideration by which the rate is determined is the monopolistic principle of maximum profits. The carrier is capable of seeing that a rate may be so high as to be restrictive of profits, and that such a rate is unreasonably high. The consumer, however, is frequently of the opinion that a rate which yields the maximum profit to the carrier may yet be unreasonably high and the small shipper is interested in the establishment and maintenance of a proper relation between rates. The weighing and balancing of these various interests can be done only by a tribunal not more closely connected in interest with one than with another of these three parties, and the character of the consideration demanded requires that the tribunal be legislative or administrative in its nature rather than judicial.

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RAILWAY LEGISLATION IN THE UNITED STATES, by Balthasar Henry Meyer, Ph. D., Professor of Institutes of Commerce, University of Wisconsin. New York: The Macmillan Company. London: Macmillan & Co., Ltd., 1903, pp. xiii, 329.

Doctor Meyer in this little volume, one of the Citizen's Library series, gives a "condensed analysis of the private and public laws which govern rail-"ways in the United States, and of the important decisions relating to inter-"state commerce." Especially interesting is the introduction, consisting of four chapters and comprising about a sixth of the book. In this portion the author gives a compendious sketch of the history of railway legislation, comparing with that of the American States that of England and the continental countries. Part II, The Progress of Railway Legislation, is in large part a working over of matter submitted by the author to the United States Industrial Commission and published in Vol. IX of the reports of that Commission. The present treatment differs from the report to that Commission in that specific references have been indicated wherever practicable. In this part are to be found some very instructive examples of the early methods of promoting and constructing railways. They suggest that not all of the principles of "high finance" have been discovered within the ten years last past. Part III, The Past and Future of the Interstate Commerce Commission, will probably be found the most interesting part of the book to the present-day reader. Therein is given a brief history of the agitation leading up to the enactment of the Act to Regulate Commerce, passed in 1887, and of the abuses out of which this agitation grew. This is followed by a chapter dis-